IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO._____

JOHN PATRICK FLANNERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

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## TOPICAL INDEX


| | Page |
|---|---|
| Table of Authorities | ii |
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 3 |
| CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED | 4 |
| STATEMENT OF THE CASE | 6 |
| REASONS FOR GRANTING THE WRIT | 13 |
| CONCLUSION | 37 |

APPENDIX A

OPINION OF THE COURT OF APPEALS

APPENDIX B

LETTER RE RULE 3(a) SUBMISSION WITHOUT ORAL ARGUMENT

Appendix C
Order Denying Petition For Rehearing

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964) | 27 |
| Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) | 19 |
| Argersinger v. Hamlin, ___ U.S. ___, 92 S.Ct. 2006 (1972) | 21 |
| Ashe v. Robinson, 450 F.2d 681 (D.C. Cir. 1971) | 20 |
| Bandy v. United States, 245 Fed. 98 | 33 |
| Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954 | 17 |
| Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917) | 28, 29, 30 |
| Castillon v. United States, 298 F.2d 256 (9th Cir. 1962) | 27 |
| Coppedge v. United States, 369 U.S. 438, 83 S.Ct. 917 (1962) | 17, 20 |

(Cases continued)


| | Page |
|---|---|
| Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974 (1958) | 19 |
| Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) | 33, 34, 36 |
| F.C.C. v. W.J.R., 337 U.S. 265, 69 S.Ct. 1097 (1949) | 21 |
| Grant v. McAuliffe, 41 C.2d 859, 264 P.2d 944 (1953) | 32 |
| Griffin v. Illinois, 351 U.S. 565, 76 S.Ct. 585 (1956) | 17 |
| Hanley v. United States, 123 Fed. 849 | 33 |
| Holmgren v. United States, 317 U.S. 509, 30 S.Ct. 588 (1909) | 28, 30 |
| Huth v. Southern Pacific Co., 417 F.2d 526 (5th Cir. 1969) | 24 |
| Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968) | 14 |
| Londoner v. Denver, 210 U.S. 373, 28 S.Ct. 706 (1908) | 21 |

(Cases continued)


| | Page |
|---|---|
| People v. Bowley, 59 Cal.2d 855, 31 Cal.Rptr. 591 (1963) | 30, 32, 36 |
| People v. Hooker, 126 Cal.App.2d 394, 272 P.2d 839 (1954) | 36 |
| SEC v. Texas Gulf Sulphur Co., 466 F.2d 1301 (2nd Cir. 1971) | 21 |
| United States v. Allen, 408 F.2d 1287, 1288 (D.C. Cir. 1969) | 20 |
| United States v. Andrews, 455 F.2d 632, 633, ftn. 1 (9th Cir. 1972) | 33 |
| United States v. Jercha, 458 F.2d 1340 (9th Cir. 1972) | 23 |
| United States v. Quiles, 344 F.2d 490 (9th Cir. 1965) | 26 |
| Wong Sun v. United States, 371 U.S. 481, 83 S.Ct. 407 (1963) | 27 |

## Constitutions


| | Page |
|---|---|
| U.S. Constitution | |
| Fifth Amendment | 3, 4 |
| Sixth Amendment | 3, 4 |


## Statutes and Codes


| | |
|---|---|
| 18 U.S.C. §2113(a)(d) | 2, 6 |
| 28 U.S.C. §1254(1) | 3 |
| 28 U.S.C. §1291 | 16 |
| 42 U.S.C. §1988 | 34, 36 |
| California Evidence Code | |
| §1111 | 30 |


## Rules


| | |
|---|---|
| Federal Rules of Appellate Procedure Rule 34b | 19, 20 |
| Federal Rules of Criminal Procedure, Rule 37(a) | 16 |
| Rules of the United States Court of Appels for the Fifth Circuit, Rule 18 | 14 |

(Rules continued)


| | Page |
|---|---|
| Rules of the United States Court of Appeals for the Sixth Circuit, Rule 7(e) | 14 |
| Rules of the United States Court of Appeals for the Eighth Circuit, Rule 6 | 18 |
| Rules of the United States Court of Appeals for the Ninth Circuit, Rule 3(a) | 5, 12 |


Texts


| | |
|---|---|
| 19 Cal.Jur.2d, Evidence §498 | 31 |
| Committee on Federal Courts, The Association of the Bar of the City of New York, Appeals to the Second Circuit 33 (1970 | 15 |
| Edwards, Exorcising the Devil of Appellate Court Delay, 58 ABA J. 149 (1972) | 19, 25 |

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---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

Petitioner, JOHN PATRICK FLANNERY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit

entered in this proceeding on September 6, 1972.

## OPINION BELOW

The Opinion of the court below is not yet reported, and appears as Appendix A herein. No written opinion was rendered by the United States District Court for the Central District of California.

## JURISDICTION

The judgment and opinion of the court below was entered on September 6, 1972, affirming Petitioner's conviction in the United States District Court for the Central District of California for violating 18 U.S.C. §2113(a)(d). A timely Petition for

Rehearing was denied on October 4, 1972 and this Petition for Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether "screened" and summary disposition of Petitioner's appeal deprived him of his right to an appellate hearing and effective assistance of counsel, contrary to the due process and equal protection provisions of the Fifth Amendment and the right to counsel provisions of the Sixth Amendment.

2. Whether Petitioner's conviction based upon the uncorroborated testimony of an accomplice deprived him of due process of law

guaranteed by the Fifth Amendment.

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person be deprived of his life, liberty or property, without due process of law . . . . ."

United States Constitution, Sixth Amendment, Right to Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense."

Federal Rules of Appellate Procedure, Rule 34(b):

"Time Allowed For Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed thirty minutes for argument. . . ."

Rules of the United States Court of Appeals for the Ninth Circuit, Rule 3(a):

"Classes of Cases to be Submitted Without Oral Argument. Pursuant to Rule 34(b), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, petition for original writ,

or petition for review or enforcement of an administrative order in which . . . (b) the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court. . . ."

## STATEMENT OF THE CASE

By indictment returned in December, 1971 Petitioner was charged with robbery of a national bank by means of a dangerous weapon in violation of 18 U.S.C. §2113(a)(d). It was alleged that he had robbed the Rancho Conejo Branch of the Security Pacific National Bank, in Newbury Park,

California on December 4, 1969.

Petitioner was tried by a jury. The evidence that a robbery of the national bank identified in the indictment had taken place on the date specified was undisputed. Witnesses to the robbery testified that four men in a black Cadillac El Dorado arrived at the bank about noon. They said that three of the men got out of the car, burst into the bank, one of the men fired a shot into the ceiling of the bank, a robbery in progress was announced by the men, and over $2,000.00 was taken. All four men left in the Cadillac. None of the witnesses was able to identify any of the robbers because they were all wearing masks. (Reporter's Transcript [hereinafter "R.T."] 42, 44, 46, 48, 53, 56, 58, 67, 69).

There was uncontradicted testimony relating to the "getaway". Shortly after noon a woman saw the Cadillac drive up near a blue van parked in front of her house. She testified that she saw three men get out of the Cadillac and get into the van. The driver of the Cadillac then drove the car away (R.T. 74-75). There was testimony that later that day the van was located near an apartment in which clothing, subsequently identified as resembling that worn by the robbers, and $540.00 identified as coming from the robbed bank, were found. (R.T. 79; Clerk's Transcript [hereinafter "C.T."] 35-36). Further testimony revealed that the abandoned Cadillac was also found. It proved to have been stolen.

Petitioner's purported participation in the robbery was established by the testimony of the chief architect of the robbery, and admitted accomplice, Frederick Kagan. He testified that he and two other men, Henderson and Halloren planned a bank robbery during November, 1969. They invited Petitioner to join them and paid for his air fare to Los Angeles by charging his ticket to Kagan's United Air Lines Credit Card (R.T. 160, 161, 164-65, 167-69, 170, 172-73).

Kagan testified that on the day of the robbery Halloren arranged to use the apartment in which the clothing was later found (R.T. 187). Halloren, Henderson, Kagan, Petitioner and a fifth man named Murphy, who, according to Kagan, was also from out

of town, went to the apartment. They used the previously stolen Cadillac and the blue van, which belonged to Kagan (R.T. 185-86). All the men except Kagan left, purportedly to rob the bank, using the Cadillac and carrying guns (R.T. 191). Kagan said that he remained behind in the apartment.

Kagan testified that later that day all four men returned to the apartment where he was waiting, using his van (R.T. 198). They talked about the robbery, drank and set aside $540.00 for use as Henderson and Halloren's bar bill (R.T. 199). They then left, Halloren going first, followed by Kagan (R.T. 199-200). According to Kagan he next saw Petitioner about two weeks later at

which time Petitioner told him that after Kagan left the apartment a sheriff came to the door and inquired about the owner of the van. Petitioner told Kagan he had denied any knowledge of it (R.T. 202).

Kagan identified the clothing found in the apartment as resembling that worn by his fellow bank robbers. He indicated a black jacket and hat as the clothing worn by Petitioner (R.T. 191).

Petitioner's fingerprints were found on the exterior, passenger side of the blue van, and on a drinking glass which was found in the apartment (R.T. 127, 128, 137, 146).

The defense initially considered presenting the testimony of two witnesses, Henderson and Murphy. Murphy had to be subpoenaed from

Boston and the court would not permit a continuance for this purpose (R.T. 245). At the close of the Government's case in chief the defense rested without presenting any evidence (R.T. 254).

The jury returned a verdict of guilty and Petitioner was sentenced to 20 years imprisonment. He appealed his conviction to the Court of Appeals for the Ninth Circuit. After briefs were filed Petitioner was notified that pursuant to Rule 3(a) of the Rules of the United States Court of Appeals for the Ninth Circuit his case would be submitted to the Court without oral argument. (See Appendix B herein.) In due course the Court affirmed Petitioner's conviction.

## REASONS FOR GRANTING THE WRIT

1. This Court has not decided the question here presented: Whether the United States Court of Appeals for the Ninth Circuit promulgated a valid rule allowing it, in its absolute discretion, to screen and dispense with oral argument in some non-frivolous criminal appeals pending before it as a matter of right. The need for a definitive statement by this Court as to the constitutionality of such a rule is compelling. The issue is of significance, not merely to appellants within the Ninth Circuit, but to those in all Circuits. Courts of Appeals are searching for ways to alleviate what has been referred to as the burden of the "exploding"

appellate docket. See Jackson v. Choate, 404 F.2d 910, 911 (5th Cir. 1968) (Brown, C.J.). In an effort to reduce the backlog of pending cases, some Circuits have adopted rules such as is here involved. See, e.g. Rules of the United States Court of Appeals for the Fifth Circuit, Rule 18. Others have promulgated rules which allow the Court to limit the time for oral argument in some cases (see, e.g. Rules of the United States Court of Appeals for the Sixth Circuit, Rule 7(e)) while some Circuits, notably the Second, consider oral argument of such importance that the court discourages submission of cases without oral argument. Committee on Federal Courts, The Association Of The Bar of The City of New York, Appeals to the

Second Circuit 33 (1970).

The proliferation of rules relating to the right of a criminal appellant to have oral argument in those cases in which the merits of the case are reviewed and decided has created conflicts among the Circuits. Some Circuits afford a more complete hearing on appeal than do others, thus raising a question of discrimination which requires resolution by this Court. In addition, a number of questions which this Court should answer in order to give guidance to the Courts of Appeals in their efforts to control their crowded dockets, are raised by rules allowing for the discretionary elimination of oral arguments in criminal appeals as well as by the particular rule in effect in the Ninth Circuit, and the manner in

which that rule has been effectuated.

A. Does a rule which creates a "class" of criminal appeals which are decided without argument because, in the opinion of the Court, "oral argument would not be of assistance" satisfy guarantees of due process and equal protection?

The question must, of course, be viewed in the framework of the right of every federal criminal defendant who is convicted of a crime to take a direct appeal of his case. 28 U.S.C. §1291; Federal Rules of Criminal Procedure, Rule 37(a). Each such appellant who meets the procedural requirements prescribed in the rules is entitled to a full hearing of his cause in the Court of Appeals. This has, traditionally, included the appellant's right to oral argument in

all but frivolous cases. Rules giving Courts of Appeals discretion to dispense with oral argument in some non-frivolous direct criminal appeals are a departure from the established practice, create an invidous discrimination against some appellants (thus depriving them of equal protection of the laws [Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693 (1954)]) and deprive them of due process of law.

This Court has emphasized that no arbitrary roadblocks may be erected to deprive some appellants of the complete review others are entitled to receive. See, e.g. Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917 (1962); Griffin v. Illinois, 351 U.S. 565, 76 S.Ct. 585 (1956). Rules such as the one here involved, which allow the Courts to screen some criminal

appeals and dispose of them on the merits without oral argument do arbitrarily and capriciously deny some appellants the type of hearing on appeal which is available to others as a matter of right. Under such rules it does not matter that counsel for appellant is desirous of making a face to face presentation directly to the adjudicating tribunal. They make no provision for oral argument on request. Compare rules of the United States Court of Appeals for the Eighth Circuit, Rule 6. Under such rules it is of no moment that "oral argument is of great assistance to the court. It is particularly valuable in arriving at a 'court' decision rather than a one judge decision or separate decisions by three judges arrived at individually." Edwards, Exorcising the Devil

of Appellate Court Delay, 58 ABA J. 149 (1972). Under such rules some substantial cases are decided after counsel for the appellant has had an opportunity to use both written and verbal skills of advocacy, while others are decided on a "papers only" basis; some appellants receive full benefit of counsel, others do not. Cf. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967); Ellis v. United States, 356 U.S. 674, 78 S.Ct. 974 (1958).

Such rules create no "class" of cases in which oral argument is not allowed. (Federal Rules Appellate Procedure, Rule 34b). Not all cases are "heard" without oral argument. No limitation is placed upon the court's authority to deprive a case of a place on the oral argument calendar.

There is no need for the Court to decide that summary relief "is proper and that the merits of [the] claim so clearly warrants relief as to justify expedited action." United States v. Allen, 408 F.2d 1287, 1288 (D.C. Cir. 1969); Ashe v. Robinson, 450 F.2d 681 (D.C. Cir. 1971). Cases of substance are disposed of summarily without oral argument, as readily as are frivolous appeals. "To be sure, frivolity or some analogous standard [does not delimit] those appeals which can be decided without oral argument." Coppedge v. United States, supra, 369 U.S. at 461, Clark, J., dissenting. The "class" under such rules exist at the whim of the court and is therefore no "class" within the meaning of the Federal Rules of Appellate Procedure,

Rule 34b.

Oral argument on appeal is a "right", not an exercise of discretion. Compare Londoner v. Denver, 210 U.S. 373, 28 S.Ct. 706 (1908); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2nd Cir. 1971). Cf. F.C.C. v. W.J.R., 337 U.S. 265, 69 S.Ct. 1097 (1949). If it may be dispensed with at all, this Court must establish guidelines whereby each court, and each appellant will know what "class" of cases permits of no argument (Cf. Argersinger v. Hamlin, ____U.S.____, 92 S.Ct. 2006 (1972)) and no court will be authorized in its unfettered discretion, to deprive some criminal appellants of the right to a full hearing.

B. Does a rule which permits clerks to "screen" cases to be decided without argument satisfy requirements

of due process?

The process used by the Court of Appeals for the Ninth Circuit in arriving at the decision to dispense with oral argument in some cases has been described by Chief Judge Chambers as follows:

> "We have a jerry-built law center with one regular law clerk. Circuit judges loan law clerks to the 'center' for one or two months at a time. . . . Each week the clerk of our court sorts out perhaps two dozen of the cases at issue. These he sends to the law clerks' law center. . . . About three fourths of the cases the law clerks send back to the clerk of the court as

not suitable for screening. . . . For the week of January 24, 1972, the law clerks' law center selected six cases for 'screening', prepared memoranda on the six cases and prepared little opinions for us. . . . (Of the six cases of the week, the judges of the panel rejected two, leaving four for the abrupt process of screening.). . . ."

United States v. Jercha, 458 F.2d 1340 (9th Cir. 1972).[1/]

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1/ Judge Chambers' concurring and dissenting comments appear in the slip opinion of the Jercha case. They do not appear as part of the opinion published in the Advance Sheets. Counsel for Jercha advises that to the best of his knowledge Judge Chambers' comments have not been withdrawn.

The process of selecting and rejecting cases for "screening", as Judge Chambers intimated in his remarks, would appear to be a judicial process. In the Ninth Circuit it appears that this exercise of judicial discretion is being performed by non-judicial clerks and law clerks. Due process requires that it be conducted by judicial officers. See, Huth v. Southern Pacific Co., 417 F.2d 526 (5th Cir. 1969) which describes the judicial screening process conducted by the Fifth Circuit.

C. Should United States Circuit Courts of Appeals be permitted to select a method of relieving congested calendars which maximizes, rather than minimizes, restrictions on rights of criminal appellants?

The elimination of oral argument in non-frivolous criminal appeals is a drastic method of calendar control. The United States Court of Appeals for the Sixth Circuit has promulgated rules which are apparently effective in eliminating appellate calendar congestion, and which do not arbitrarily foreclose on appellants' rights to oral argument. See, Edwards, Exorcizing the Devil of Appellate Court Delay, supra. This Court should exercise its supervisory power over the Courts of Appeals to insure the utilization of methods of docket control which assure a full and fair hearing to criminal appellants of every Circuit.

2. The federal rule that a conviction may rest upon the uncorroborated evidence of an accomplice needs to be re-examined.

The case against Petitioner consisted almost entirely of the testimony of Frederick Kagan, the admitted architect of the bank robbery. Kagan testified that he had quite possibly received leniency in the courts as a result of his cooperation with the FBI (R.T. 213-215). Thus, one of the questions here is whether a conviction based upon evidence so obviously tainted as a matter of law is sufficient proof beyond a reasonable doubt.

Routinely, Courts of Appeals repeat the "rule" that corroboration of an accomplice's testimony is not required to convict in the federal courts. E.g. United States v. Quiles, 344 F.2d 490 (9th Cir. 1965). Just as routinely, the same courts concede that information imparted from an informant to a police officer without

corroboraticn of criminal conduct will not justify either an arrest or a search. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964); Wong Sun v. United States, 371 U.S. 481, 83 S.Ct. 407 (1963); Castillon v. United States, 298 F.2d 256 (9th Cir. 1962). In other words, if the testimony of the accomplice (informant) Kagan were introduced for purposes of obtaining a search warrant to search Petitioner JOHN PATRICK FLANNERY'S home, it could not meet the test enunciated in the countless cases decided by this Court, and Courts of Appeals. Consequently, the incongruous conclusion is that it takes less evidence to justify a conviction with a reasonable doubt standard than it does to justify a search which requires only "probable cause". Despite the often enunciated rule that

uncorroborated accomplice testimony is sufficient for conviction, this incongruity makes the rule irrational and worthy of this Court's consideration.

This Court previously has not directed its full attention to the question. Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192 (1917) often cited for the proposition that an accomplice's uncorroborated testimony may support a conviction, did not consider that proposition. In Caminetti this Court reaffirmed its decision in Holmgren v. United States, 317 U.S. 509, 30 S.Ct. 588 (1909) in which it refused to reverse for failure to give an instruction that the testimony of accomplices should be believed only where corroborated. The Holmgren decision, however, involved the

controverted status of the witnesses (the question being whether or not they were accomplices). Basing its decision on the fact that the jury could have decided they were not accomplices (and that it would have been error to instruct that they were accomplices) this Court decided that corroboration would not have been required and the absence of the requested instruction was not error. This Court specifically stated that it is the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroboration before giving credence to such testimony.

Caminetti, again considering only the propriety of the instruction indicating that the witnesses were

accomplices, accepted the Holmgren view, but added that there is no absolute rule of law preventing convictions on accomplice testimony, if credible. Caminetti v. United States, supra, 242 U.S. at 493.

The better practice appears to have been replaced by the gratuitous exception casually mentioned by this Court in Caminetti. This is doubly reprehensible since the unwavering application of the Caminetti exception as justification to convict on uncorroborated accomplice testimony subverts substantial rights. See, People v. Bowley, 59 Cal.2d 855, 31 Cal.Rptr. 591 (1963).

Thus, California Evidence Code §1111 prohibits a conviction on the uncorroborated testimony of an accomplice. It provides in part,

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The requirement is a substantive one about which the California Supreme Court quoting with approval 19 Cal. Jur.2d, Evidence §498, p. 267 (now, 19 Cal.Jur.2d, Rev., Evidence §720, p. 596) said the following:

"'The Court has no discretion to deviate from

the requirement of the statute, and the rule applies although the jurors are convinced to a moral certainty of the guilt of the accused. They may not convict without the requisite corroborative evidence . . . . The requirement is based on the theory that accomplice testimony comes from a tainted source, is usually given in hope or expectation of leniency or immunity, is untrustworthy, and should be viewed with caution.'"

People v. Bowley, supra, 59 C.2d at 857.

See also, Grant v. McAuliffe, 41 C.2d 859, 264 P.2d 944 (1953). See,

United States v. Andrews, 455 F.2d 632, 633, ftn. 1 (9th Cir. 1972).

Another question presented here arises out of the fact that the California Rule of Evidence, which is in conflict with the one applied by the Ninth Circuit, is a substantive one. In the absence of Congressional provisions, older cases resorted to the common law in preference to local state statute requiring corroboration of an accomplice's testimony. Bandy v. United States, 245 Fed. 98; Hanley v. United States, 123 Fed. 849. In 1938, this Court, in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) announced certain principles regarding federal common law and the federal courts' responsibility to follow state law, common and statute: "Except in

matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." Erie R. Co. v. Tompkins, 304 U.S. 64, at 78. (Emphasis added.)

Congress has also provided, in 42 U.S.C. §1988:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18 . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect, but in all cases where they are not adapted

to the subject . . . the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held . . . shall be extended to and govern the said courts in the trial and disposition of the cause, . . . ."

(Emphasis added.)

It would appear, then, that the common law rule that the uncorroborated testimony of an accomplice was sufficient to sustain a conviction has been modified and changed in California by its legislature, and the California Supreme Court has announced and confirmed that change as a substantive

one it is not free, nor inclined, to alter. People v. Bowley, supra; People v. Hooker, 126 Cal.App.2d 394, 272 P.2d 839 (1954). (It should be noted that under the California rule, the "corroborating" evidence against Petitioner would have been insuficient.) In order to bring the federal rule into conformity with the California courts, under the authority of Erie R. Co. v. Tompkins, supra, and 42 U.S.C. §1988, and with the rationale of "probable cause" situations this Court should fully consider the validity of the rule permitting a conviction to rest on uncorroborated accomplice testimony.

## CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to

review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ALAN SALTZMAN and
MARTHA GOLDIN

By: MARTHA GOLDIN

Attorneys for Petitioner

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN PATRICK FLANNERY, *Defendant-Appellant.* | No. 72-1657 |

[September 5, 1972]

On Appeal from the United States District Court
for the Central District of California

---

Before: MERRILL, KILKENNY and TRASK,
Circuit Judges.

PER CURIAM:

We find no merit in appellant's contentions on appeal.

Fingerprints of appellant found in an apartment where the conspirators had gathered and on a vehicle involved in the robbery served to connect him with the crime, in corroboration of the testimony of an accomplice.

Appellant's trial counsel, as a matter of tactics, chose to call no witnesses in defense, and argued to the jury (as counsel on appeal argue to us) that the Government's case was impermissibly weak. Appellant is bound by such a reasonable exercise of professional judgment. *Eaton v. United States*, 437 F.2d 362 (9th Cir. 1971). There was no need for the court to obtain an express waiver from appellant.

Affirmed.

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APPENDIX A

COPY BOUND CLOSE IN CENTER

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

August 17, 1972

TO ALL COUNSEL:

re: No. 72-1657, USA v. John P. Flannery

Dear Sir:

Pursuant to the provisions of this court's Rule 3(a), as amended July 6, 1971, your case has been classified as one in which the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court. The case is now deemed submitted for decision.

You may, if you wish, serve and file, in quadruplicate, within ten days, a supplement to your brief, listing new court decisions or cases which you previously overlooked, or call attention to new factual developments which may possibly moot the appeal, call for substitution of parties, or alert the court to other pending appeals involving the same issues.

Very truly yours,

Emil E. Melfi, Jr.
~~William Br Luck~~,
acting Clerk of Court

WEL/pn
cc: Alan Saltzman, 6430 Sunset Blvd., Hollywood, Ca. 90028
John P. Flannery, c/o Alan Saltzman
U.S. Attorney, Los Angeles, Ca.
P.L. #60 attn: Eric A. Nobles & John F. Walter, Asst.
Revised 7/6/71

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 72-1657

JOHN PATRICK FLANNERY,

Defendant-Appellant.

On Petition for Rehearing

Before: MERRILL, KILKENNY and TRASK, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-685

JOHN PATRICK FLANNERY, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of having robbed a federally insured bank, in violation of 18 U.S.C. 2113(a) and (d). He was sentenced to imprisonment for twenty years. The court of appeals affirmed *per curiam* without oral argument (Pet. App. A).

At trial the evidence showed that at noon on December 4, 1969, three gunmen wearing stocking masks emerged from a dark-colored Cadillac driven by a fourth person and entered a branch of the Security Pacific National Bank in Newbury Park, California (Tr. 38-42, 46, 56). One of them fired a shot into the

bank's ceiling and ordered employees and customers to lie on the floor (Tr. 42, 56, 69). After taking currency from the tellers' cages, the robbers, one of whom wore a black felt hat, fled with $2,232 in cash (Tr. 42, 69-71, 114). A witness outside the bank noted the license number of the getaway car and gave it to police (Tr. 54). Later that afternoon police found a stolen dark blue Cadillac bearing that license number abandoned on Tereasa Street in Newbury Park (Tr. 87-89). A woman who lived on Tereasa Street told officers that around noontime she had seen several men get out of the Cadillac and drive off in a blue van (Tr. 73-75). Later that afternoon, officers saw a similar blue van parked outside 700 Windy Drive in Newbury Park (Tr. 79-80). The landlord told police that the van belonged to someone in apartment 13 (Tr. 82). Officers subsequently searched the apartment. No one was home, but the search yielded four pistols, bills whose serial numbers matched those of "bait" money taken in the robbery, and various items of clothing, including a black felt hat which a bank customer identified in court as similar to that worn by one of the robbers (Tr. 71, 232-233).[1]

The government's principal witness was Frederick Kagan, the owner of the blue van (Tr. 183). He testified that in November 1969 he and two other man—Edward Halloren and David Henderson—planned the robbery of the Security Pacific Bank.[2] After visiting

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[1] The admissibility of the evidence seized during the search is not challenged.

[2] Kagan had previously pleaded guilty to conspiracy to commit the robbery (Tr. 163-164).

the bank the three men agreed that robbing it would require additional manpower (Tr. 164-167). In Kagan's presence, Henderson talked to petitioner by long distance telephone and asked him to come to California to participate in the robbery (Tr. 169). Later Kagan spoke with petitioner by telephone and arranged for him to fly to California from Boston using a ticket purchased with Kagan's credit card (Tr. 172-173). According to Kagan and as verified by an airplane ticket introduced into evidence, petitioner arrived in Los Angeles on December 2, 1969, two days before the robbery (Tr. 176, 247-248). When Kagan met petitioner at the airport, petitioner asked about the anticipated "take" in the robbery (Tr. 177-178).

Kagan testified in great detail about the bank robbery. He described the theft of the Cadillac (Tr. 175-177), the selection of the escape route (Tr. 179), the proposed division of the loot (Tr. 182), and the recruitment of one Murphy to assist in the holdup (Tr. 184). According to Kagan, petitioner, Henderson, Halloren, Murphy, and he slept at his house in Newbury Park the night before the robbery (Tr. 186). The next morning, they all went to apartment 13 at 700 Windy Drive—the keys to which Halloren had obtained from the tenant under false pretenses—and made final preparations for the robbery (Tr. 187-188). At 11:45 a.m. petitioner, Henderson, Halloren and Murphy drove away in the stolen Cadillac taking guns with them (Tr. 191, 197). Petitioner wore a black felt hat (Tr. 193). Kagan remained at the apartment. Twenty to thirty minutes later, petitioner and the other three men drove back to the apartment in Kagan's

blue van (Tr. 197-198). The returning men commented on the small take in the robbery. Petitioner poured glasses of liquor for everyone and he and Kagan counted the loot (Tr. 198-199). The robbers left the apartment before the police came (Tr. 200-201).

A government fingerprint expert testified that fingerprints matching petitioner's were found in Kagan's van and on a drinking glass in the apartment (Tr. 127-128, 137, 146).

1. Petitioner contends that his conviction rested solely on the uncorroborated testimony of Kagan and that such evidence should be held insufficient. However, this case does not involve the situation of a conviction founded entirely on accomplice testimony, since Kagan's testimony was corroborated by the finding of petitioner's fingerprints in the apartment where the conspirators gathered and on the van used in the robbery, as well as by other evidence set forth above. As the court below held, the evidence amply supported the jury's verdict.

2. Petitioner also contends that the determination of his appeal without oral argument pursuant to Rule 3(a) of the Rules of the Ninth Circuit denied his constitutional rights. Petitioner argues that due process requires oral argument on appeal. He also asserts that the Ninth Circuit's screening process is performed by clerks and law clerks, rather than judges, relying on a concurring opinion of Judge Chambers in *United States* v. *Jercha,* 458 F. 2d 1340 (C.A. 9), which does not appear in the published reports (Pet. 22-23). There is no merit to these contentions. Rule 3(a) of the Ninth Circuit is similar to local rules in both the

Fifth and District of Columbia Circuits the constitutionality of which has been consistently sustained. See, *e.g., Huth* v. *Southern Pacific,* 417 F. 2d 526, 527-530 (C.A. 5); *United States* v. *Baber,* 447 F. 2d 1267, 1270-1271 (C.A. D.C.), certiorari denied, 404 U.S. 957; see also, *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 274-277. Indeed, this Court frequently disposes of cases on their merits without hearing oral arguments. See, *e.g., One Lot Emerald Cut Stones* v. *United States,* No. 72-376 (decided December 11, 1972) (judgment affirmed); *Cool* v. *United States,* No. 72-72 (decided December 4, 1972) (judgment reversed). With respect to the claim that the Ninth Circuit's screening process is performed by clerks, the opinion of Judge Chambers on which petitioner relies reveals only that clerks are assigned initially to screen the cases and to prepare "little opinions"; the opinion further states that of the six cases prepared that week the "judges of the panel rejected two," showing that the members of the court make the ultimate judicial determination. In fact the letter sent to counsel in the present case by the Clerk of the Ninth Circuit, advising them that the case would be submitted without oral argument, stated that this treatment reflected "the unanimous opinion of a panel of the court" (Pet. App. B).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

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